

# Jeopardizing Judicial Dialogue is Contrary to EU Law

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On 15 April 2021, AG Pikamäe delivered his [opinion](#) in the *IS* case, originating from a Hungarian criminal proceeding against a Swedish national. The national judge referred three questions for preliminary reference to the CJEU, one regarding the suspect's right to translation and two regarding the general status of judicial independence in Hungary. As a reaction, the Hungarian Prosecutor General initiated a so-called "appeal in the interests of the law" and the Hungarian Supreme Court held the reference to be unlawful. As a direct consequence of the declaration of illegality, disciplinary proceedings were started against the judge. These latter procedures were addressed in additional questions to the CJEU.

In his opinion, AG Pikamäe argued that the initial questions to the CJEU regarding judicial independence were irrelevant for the case, but the additional questions raised could be admissible. He underlined the importance of a free dialogue between independent national courts for EU law. But the opinion also shows that the preliminary ruling mechanism cannot remedy the Commission's inaction to address systemic problems through its rule of law tools, such as Article 7 TEU or infringement procedures.

## The preliminary reference

The case C#564/19 criminal proceedings against *IS* originates from a Hungarian criminal proceeding of a Swedish national, suspended by Judge Vasvári of the Pest Central District Court. The suspect was charged for bringing weapons he lawfully held in his home country without the requisite permission to the territory of Hungary.

The case was extensively discussed by Hungarian colleagues on this blog. (See analyses by [Dániel G. Szabó](#), and [Judge Vadász](#).) The procedure was suspended and the national court referred three questions to the CJEU in line with Article 267 TFEU. First, Judge Vasvári asked whether the accused was denied the use of his first language during the proceedings, in violation of Directive 2010/64/EU, considering that there is neither a register of independent interpreters and translators in Hungary, nor an effective quality system for translators and interpreters. Second, the judge asked whether certain elements of what he considers to be a judicial capture were corresponding to the rule of law and judicial independence as guaranteed by the Treaties. Third, the court asked whether the judges' low remuneration was in line with the concept of judicial independence as understood in EU law.

As [reported](#) earlier, after the reference had been submitted to Luxembourg, the Hungarian Prosecutor General initiated a so-called "appeal in the interests of the

law” against the decision incorporating the preliminary reference in front of the Kúria (the Hungarian Supreme Court). He argued that all questions were irrelevant for the case at hand, but the second and third questions were particularly problematic, since they did not influence the outcome of the criminal procedure and were not even about the interpretation of EU law. The Kúria agreed with the Prosecutor General without reservations and held the reference to be unlawful, without attaching any further legal consequences to this finding. (This was the maximum the Kúria could do in line with Article 669(3) of the Code of Criminal procedure as in such cases the decision is declaratory in nature.) The Kúria’s decision straightforwardly restricted lower courts’ right (and sometimes even obligation) to turn to the CJEU, since – so the judgment goes – the harmony between Hungarian and EU law must not be subject to preliminary references. And due to the hierarchy of courts, every single ordinary judge in Hungary must respect the Kúria’s decision.

But there is more: The Acting President of the Metropolitan Court, expressly because the reference for a preliminary ruling had been rendered unlawful by the Kúria, initiated a disciplinary proceeding against the referring judge.

In light of the above circumstances two more questions were added to the preliminary request by the referring court: whether it was in line with EU law to declare a preliminary reference unlawful, and whether it was permissible to start disciplinary proceedings against a judge for filing preliminary references.

## **The AG Opinion**

On 15 April 2021 AG Pikamäe delivered his [opinion](#) in *IS*. The AG recalled that questions referred for preliminary rulings can only be admitted if they are necessary to be answered by the CJEU in order for the referring court to pass a judgment in the case before it. The first question on the right to interpretation is deemed to be relevant by the AG and therefore admissible. (paras 53-84) But in the AG’s view, the second and the third questions relating to the overall health status of the Hungarian judiciary are not suited for preliminary ruling procedures, since they are irrelevant for the national procedure, and are therefore inadmissible. (paras 85-92) The fourth and fifth questions in turn are related to domestic attempts to destroy the system of preliminary references and usurp the powers of the CJEU to determine which preliminary questions are relevant and admissible, and which are not. The AG suggests making question four on the declaration of illegality admissible, while regarding question five on disciplinary proceedings, he offers alternative paths for the CJEU.

## **Declaring a preliminary reference illegal**

The AG underlines the importance of a free dialogue between independent national courts and the CJEU for the preliminary ruling procedures to function. Initiating such a procedure depends exclusively on the court before which a case is pending, and it is up to the CJEU alone to determine whether answering the referred questions is indeed needed for the original dispute. (paras 44-47) Ultimately the questions

may be irrelevant and thus inadmissible, but the CJEU insists to retain the right to determine this. Once the CJEU delivers a preliminary ruling on the interpretation of EU law, the referring national court is required to follow that ruling. The declaration of illegality, published in the Hungarian compendium of judgments of principle, might hinder national judges from fulfilling this obligation. (para 49) Answering the fourth question, therefore, the AG believes that – in line with the principle of the primacy of EU law –, Judge Vasvári must set aside the illegality decision and disapply the national legislation, which led the Kúria to hold that his reference was unlawful. (paras 50-52)

## Disciplinary procedures against judges

With regard to the assessment of disciplinary proceedings for filing preliminary references, the case closest to *IS* is probably [Miasto #owicz and Prokurator Generalny](#), duly referenced by the AG Opinion. In *Miasto #owicz* the state was a party, and the judges feared to be subjected to disciplinary proceedings if they were to decide against the state. So they asked the CJEU to assess Polish law in light of EU norms including previous CJEU case-law on judicial independence. As if to prove the judges' point, they were summoned to attend a hearing concerning the reasons for turning to the CJEU, when filing their preliminary references. The CJEU however declared the requests inadmissible, for the lack of necessity in light of the original dispute. Furthermore, the CJEU noted that the proceedings have since been closed on the ground that no disciplinary misconduct was proven. (For criticism of the CJEU's stance see [Professor Platon](#) and [Professor Pech et al.](#))

The AG takes this case-law into account when it holds that the disciplinary proceeding bears no relation to the actual facts of the main criminal procedure. (paras 96-97) But the AG acknowledges the “particularly worrying and regrettable circumstances” (para 93) and offers a way to the CJEU to declare the fifth question admissible. He believes that the supplementary request, i.e. questions four and five could be regarded as an indivisible, indissociable whole. Once the questions are admitted, the CJEU could rely on its obiter dictum in *Miasto #owicz*. (paras 98-100) In that case the CJEU stated that national law provisions exposing judges to disciplinary proceedings for having submitted a reference for a preliminary ruling cannot be permitted, since the mere prospect of such a proceeding is likely to undermine the effective exercise of Article 267 TFEU. (*Miasto #owicz*, paras 55-59)

## A brief assessment of the AG Opinion

The AG Opinion could have dismissed all judicial independence related questions (questions two and three) – had the Kúria not declared the reference unlawful and had the Acting President of the Metropolitan Court not initiated disciplinary proceedings. But the reference, especially its question two, was regarded as a criticism of the judicial “reform” and thus could not be left unanswered. Ironically, or perhaps naturally, the disciplinary proceeding was triggered by someone appointed in a dubious procedure, which was one of the issues discussed in the reference.

[PM Orbán](#), during the debate of the Sargentini report that culminated in triggering an Article 7(1) TEU procedure by the European Parliament against the Hungarian government, famously said that ‘We would never sink so low as to silence those with whom we disagree.’ In reality however, one of the main characteristics of the Fidesz government since 2010 is eliminating all forms of checks on the government and any type of dissent. This happens via violations of [separation of powers](#), [checks and balances](#), [constitutional scrutiny](#), [judicial oversight](#), [media pluralism](#), [journalistic freedom](#), shrinking the space for [civil society](#), [institutional](#) and [personal attacks](#) against academia – all well documented on this blog. The criticism on courts packaged in the preliminary reference by Judge Vasvári was not to be tolerated either.

And it is this overreaction by the Kúria and the Metropolitan Court that saves the case from the viewpoint of judicial independence. Because judicial independence has a special role in the EU legal system. It is not only important from the individual’s perspective, but it is also crucial for EU law, since – as [CJEU President Lenaerts](#) put it – it is domestic courts together with the CJEU, i.e. ‘the European Community of judges’, which ensure that the EU and national authorities respect the ‘rules of the game’ in a community based on the rule of law. This concern about a functioning judicial dialogue makes the CJEU react forcefully when national authorities violate judicial independence by attacking the system of preliminary references. (See cases [Atanas Ognyanov](#) and [RH](#))

The CJEU is likely to agree that the second and the third questions are irrelevant for the decision of the criminal law case. And indeed, systemic problems should be tackled in different procedures by different actors, such as Article 7 TEU procedures, rule of law conditionality, or infringement actions conducted by political EU institutions. During the [hearing](#), the representative of the Commission’s legal service, who argued for inadmissibility added that ‘[t]he Commission continues to monitor the independence of the Hungarian courts and raised concerns regarding the powers and functioning of the National Judicial Office’. This was a sadly ironic statement, since the preliminary reference in *IS* was filed exactly because of the inaction of the various institutions, and especially the Commission, that instead of guarding the Treaties and imposing dissuasive sanctions on rule of law violators, engaged in more and more monitoring, benchmarking, discussion and dialogues leading nowhere, normalising rule of law backsliding and leaving sufficient time to illiberal governments to complete constitutional capture.

The CJEU can of course not remedy the Commission’s inaction and its failure to start infringement and other procedures. But it can admit both questions four and five in the present case, and acknowledge that disciplinary proceedings come close to [SLAPP suits](#) (strategic litigation against participation) – that the EU plans to [fight](#) forcefully –, in the sense that they are meritless and vexatious lawsuits against someone formulating a position uncomfortable to a powerful party, in this case the government. The outcome of the case is less important, the procedure’s main aim is to intimidate the defendant, and to discourage him or her and others in similar shoes from expressing critical views. One could expect a rule of law friendly judgment to follow a [precautionary approach](#) and dismiss national measures

including disciplinary proceedings that are likely to have a [chilling effect](#) on the use of Article 267 TFEU proceedings or any EU law principle or value, as being contrary to EU law.

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